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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA

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9 Lorraine Pimentel, ) No. CV-09-01649-PHX-NVW  
10 Plaintiff, )  
11 vs. ) **ORDER**  
12 Michael J. Astrue, Commissioner of Social )  
13 Security, )  
14 Defendant. )  
15 \_\_\_\_\_)

16 Before the Court is Plaintiff's Application for Attorney Fees Under the Equal  
17 Access to Justice Act (Doc. 29).

18 **I. Background**

19 Pimentel has rheumatoid arthritis, fibromyalgia, hepatitis C, carpal tunnel  
20 syndrome, and degenerative disc disease of the cervical and lumbar spine, among other  
21 things. She applied for a period of disability and disability insurance benefits on  
22 December 19, 2005, alleging disability beginning December 10, 2005. An administrative  
23 hearing was held on August 21, 2008, and the administrative law judge ("ALJ") issued an  
24 unfavorable decision on October 14, 2008. On November 19, 2010, the Court vacated the  
25 final decision of the Commissioner of Social Security and remanded the case for further  
26 administrative proceedings. On January 18, 2011, Pimentel filed a notice of appeal,  
27 seeking remand for award of benefits rather than for further administrative proceedings.  
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1 On February 9, 2011, an ALJ issued a fully favorable decision. On February 22, 2011,  
2 the Ninth Circuit dismissed the appeal upon Plaintiff's motion.

3 **II. Legal Standard**

4 On a motion for attorney's fees and costs pursuant to the Equal Access to Justice  
5 Act ("EAJA"), a prevailing party is entitled to attorney's fees "unless th[is] court finds  
6 that the position of the United States was substantially justified or that special  
7 circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). Under the EAJA, the  
8 government's "position" includes both its litigating position and the action or failure to  
9 act by the agency upon which the civil action is based. 28 U.S.C. § 2412(d)(2)(D). Here,  
10 then, it includes the ALJ's decision and the Commissioner's arguments to this Court in  
11 defense of the ALJ's decision.

12 The Supreme Court has defined "substantially justified" as "justified to a degree  
13 that could satisfy a reasonable person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988).  
14 The government bears the burden of showing that its position was substantially justified.  
15 *Gonzales v. Free Speech Coalition*, 408 F.3d 613, 618 (9th Cir. 2005).

16 **III. Analysis**

17 The ALJ's October 14, 2008 unfavorable decision included three distinct errors:  
18 (1) failure to identify specific and legitimate reasons supported by substantial evidence  
19 for rejecting the opinion of treating rheumatologist Ravi Bhalla, M.D.; (2) failure to  
20 identify specific, clear, and convincing reasons for rejecting Pimentel's subjective  
21 testimony; and (3) conceded error by failing to assess Pimentel's work-related abilities on  
22 a function-by-function basis before expressing her residual functional capacity in terms of  
23 the exertional levels of work, *i.e.*, light as sedentary.

24 The first two errors flow from the ALJ assigning controlling evidentiary weight to  
25 the opinions of treating physician Dale R. Schultz, D.O., and State agency reviewing  
26 consultant Steven Otto, M.D., J.D., who relied on Dr. Schultz's speculation that Pimentel  
27 just wanted "to be on some supplemental income where she doesn't have to work"  
28 because her lack of education limited her job opportunities. Both the ALJ and Dr. Otto

1 ignored Dr. Schultz's observation that Pimentel's low back and lower extremity pain "is  
2 still problematic" and that some of her upper extremity pain was caused by recurrent  
3 carpal tunnel syndrome. Instead, they focused on Dr. Schultz's comment made two  
4 weeks later that "I do not feel she is disabled by either her carpal tunnel syndrome or her  
5 low back problem and have refused to make medical statements to that effect." The ALJ  
6 assigned controlling evidentiary weight to Dr. Otto's opinion even though Dr. Otto did  
7 not treat or examine Pimentel, Dr. Otto merely reviewed others' observations and  
8 opinions, and, as the ALJ stated, "Dr. Otto's conclusions were far more critical of the  
9 claimant's subjective allegations than the opinions of many of the other specialists who  
10 examined the claimant."

11 Moreover, Dr. Schultz's opinion was expressly limited to "her carpal tunnel  
12 syndrome or her low back problem." Therefore, it did not contradict Dr. Bhalla's opinion  
13 regarding Pimentel's pain and fatigue caused by rheumatoid arthritis, fibromyalgia, and  
14 related conditions. But even if it had, the ALJ was required to identify specific and  
15 legitimate reasons for rejecting Dr. Bhalla's opinion. The ALJ rejected Dr. Bhalla's  
16 opinion and Pimentel's subjective testimony because of Dr. Schultz's and Dr. Otto's  
17 opinions, primarily regarding Pimentel's motives and credibility, but failed to identify  
18 either "clear and convincing" or "specific and legitimate" reasons for doing so. This is  
19 not a case where the ALJ met the lower standard, but did not quite satisfy the higher  
20 standard. In this case, the ALJ did not come close.

21 Further, the third error, failing to assess Pimentel's work-related abilities on a  
22 function-by-function basis, is not harmless, as the Commissioner contends, merely  
23 because the ALJ ultimately relied on the vocational expert's testimony regarding Dr.  
24 Otto's function-by-function assessment of Pimentel's residual functional capacity. Dr.  
25 Otto's opinion was not entitled to be given controlling weight and cannot, therefore, serve  
26 as a substitute for the ALJ's function-by-function assessment.

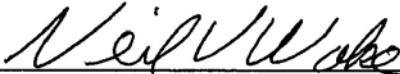
27 Thus, the Commissioner was not substantially justified in defending the ALJ's  
28 October 14, 2008 unfavorable decision, special circumstances do not make a fee award

1 unjust, and the EAJA requires the Court to award Pimentel attorneys' fees and other  
2 expenses. However, Pimentel is not entitled to a fee award for attorneys' fees incurred  
3 related to her appeal because she was not a prevailing party on the appeal. Her fee  
4 request for \$6,831.87 will therefore be reduced by \$822.78 for services related to the  
5 appeal. In addition, Pimentel will be awarded \$350.12 for the 2.0 hours expended in  
6 preparing her reply brief.

7 IT IS THEREFORE ORDERED that Plaintiff's Application for Attorney Fees  
8 Under the Equal Access to Justice Act (Doc. 29) is granted except for fees incurred on  
9 appeal. Plaintiff is awarded attorneys' fees in the amount of \$6,359.21 and costs in the  
10 amount of \$350.00.

11 IT IS FURTHER ORDERED that the Clerk enter judgment in favor of Plaintiff in  
12 the amount of \$6,359.21 for attorneys' fees and \$350.00 for costs against Defendant, with  
13 interest at the federal judgment rate from the date of entry of judgment.

14 DATED this 22<sup>nd</sup> day of April, 2011.

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17 Neil V. Wake  
United States District Judge

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